UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 23 Cr. 347 (JGK)

ALEXANDER MASHINSKY,

Oral Argument

Defendant.

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New York, N.Y.
November 7, 2024
2:30 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: PETER DAVIS
ADAM SLOAN HOBSON
Assistant United States Attorneys

MUKASEY YOUNG LLP
Attorneys for Defendant
BY: MARC LEE MUKASEY
TORREY K. YOUNG
MICHAEL F. WESTFAL

THE COURT: Good afternoon, all. Please be seated.

MR. DAVIS: Good afternoon, your Honor. Peter Davis and Adam Hobson for the government.

MR. MUKASEY: Good afternoon, Judge Koeltl. Marc Mukasey for the defendant Alex Mashinsky, who is seated to my left. With me, and we may hear from today, my colleagues Torrey Young and Michael Westfal.

THE COURT: Good afternoon, all. There are two applications pending before the Court. The first is the motion to dismiss and also to strike the bankruptcy allegation from the indictment. I'm familiar with the papers; perfectly prepared to listen to the parties for anything that they would like to tell me on that motion.

MS. YOUNG: Thank you, your Honor. I'll begin briefly with the request for Count Two, the commodities fraud count, to be dismissed as repugnant and inconsistent with Count One, the securities fraud count.

Count One, in sum, charges securities fraud based on allegations that Mr. Mashinsky made false and misleading statements to induce investors to purchase an interest in Celsius's Earn program with their crypto assets. Count Two, in sum, charges commodities fraud based on allegations that Mr. Mashinsky made false and misleading statements to induce investors to sell their Bitcoin in exchange for an interest in Celsius' Earn program. So count One securities, induced

investors to purchase; Count Two, commodities, induced investors to sell their Bitcoin for an interest.

So the government is charging as both securities fraud and commodities fraud the exact same interests in Celsius's Earn program. The same contracts --

THE COURT: Is that right? I mean, the security interest is the account. The commodity is the specific CEL that's within the account. Why does that make the two counts inconsistent? And the fact that one part of the transaction involving the account is charged under the securities laws, and the specific asset is charged under the commodities laws doesn't make them inconsistent.

Is there any case which has found that under any sort of similar circumstances a charge under securities laws is inconsistent with a charge under the commodities laws?

MS. YOUNG: Well, your Honor, I'll start with that last question, which is that we've yet to identify a single case where securities fraud and commodities fraud have been charged for the exact same program such as here. And there is, however, significant precedent under the securities law context that the totality of the circumstances are to be taken.

And when defendants tried to break apart the overall transaction and point only to the asset, the token, courts have consistently said that that cannot be done, but that's exactly what the government is doing here by charging it that way,

which is breaking apart the entire alleged securities transaction and pulling out the token as a commodities fraud.

And you can look at paragraph 12 of the indictment which kind of illuminates why this becomes irreconcilable. That paragraph and I'll quote says, "Celsius's primary public offering was its Earn program through which Celsius offered a platform for customers to provide their cryptocurrency assets to Celsius, to invest in exchange for providing their crypto assets including Bitcoin to Celsius customers." So here with a reference to Bitcoin, it's saying that those crypto assets are being provided. But in Count Two, suddenly that same Bitcoin, which is otherwise alleged in the facts as being provided is being alleged as being sold. So I'm going to give, perhaps, an example of how this might play out.

THE COURT: But why is that inconsistent? The investment program for the investment is the account, and the Bitcoin, which is one of the deposits in the account or one of the earnings for the account, is alleged to be the commodity, and the fraud with respect to the Bitcoin, or the scheme with respect to the Bitcoin, is the false statements in connection with the sale of that Bitcoin.

MS. YOUNG: But to look at the facts as alleged for the securities count, for Count One, you have to view the entirety of the program, the Earn program. So if a customer were to use Bitcoin to gain an interest in the Earn program,

the customer would somehow simultaneously be depositing the Bitcoin for an interest in the Celsius Earn program for purposes of Count One, but then also simultaneously irreconcilably be selling. And I'm going to highlight the word sale because that's what is required under the commodities statute.

THE COURT: Why does it have to be simultaneous?

MS. YOUNG: Well, there are no facts alleged to suggest that there are types of transactions when a customer provides or transfers their crypto asset for purposes of the Earn program.

THE COURT: The Earn program is a way of earning CEL in the program. What happens to the CEL when it's in the account is another issue. Are people misled into keeping the CEL or selling the CEL?

MR. MUKASEY: Judge, I apologize for interrupting. For purposes of the record, because this is going to get confusing --

THE COURT: Oh, CEL.

MR. MUKASEY: -- we should distinguish between sell and CEL. S-E-L-L is the act of selling. C-E-L is the name of a token that can be sold. Thank you, Judge.

MS. YOUNG: Your Honor, there are no facts in paragraph 1 through 71 that even amount to a sale.

THE COURT: But there's no allegation in the motion

that there are insufficient facts alleged or that the Count should be dismissed because it's vague; putting aside the other allegation of sales on the market, market transactions. There are plenty of facts alleged in the indictment, and the indictment tracks the words of the statute, which according to the cases is sufficient to state the crime. You say, well, there are insufficient facts alleged as to how these transactions were conducted. Well, isn't that a question for trial?

MS. YOUNG: No, your Honor. The argument is that there are no facts that support a sale, and there are none alleged. And while the government's fallback is the indictment tracks the statutory language, that does not save the count. I mean, we cite cases like *Rajaratnam* and *Heicklen* and *Aleynikov* where the charge tracked the statute, and yet it was considered irreconcilable, inconsistent, and repugnant and therefore dismissed.

THE COURT: Because in those cases, if you found guilt with respect to one count, it was inconsistent with finding guilt with respect to the other count.

MS. YOUNG: And that would be the same here because for securities law purposes, it would be inconsistent to take the whole and then also break it into the parts.

THE COURT: Why?

MS. YOUNG: Because the securities laws have said that

the entire Earn program is not to be viewed -- or any Earn program or transaction is not be viewed as a --

THE COURT: So you have to look at the whole transaction to find out if it's an investment contract, right? I mean, you can correct me if I'm wrong, but there's no case that says that part of an investment contract cannot be a commodity, which, if in some way it's part of a commodities fraud, it can't be separately charged.

There's no case that says that, and there's no case that says you can't have both a Securities Act violation and a Commodities Act violation in separate counts. Fair?

MS. YOUNG: There are not -- we have not identified a case that prohibits this, but there are also no facts to support Count Two. Which I do think we argued in our papers that it is inconsistent with paragraphs 1 through 71 in a reading of the indictment to then allege sale, when Count Two incorporates paragraphs 1 through 71 which repeatedly refer to the investment, transfer, you know, purchase. So to suddenly insert sale would be inconsistent with a reading of the rest of the indictment and a potential conviction under Count One.

THE COURT: Okay.

MS. YOUNG: Thank you.

THE COURT: Go ahead. Anything else on the motion to dismiss?

MS. YOUNG: I'm going to turn it to Mr. Westfal for

the other arguments.

THE COURT: Okay.

MR. WESTFAL: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. WESTFAL: Your Honor, Count Six charges Mr. Mashinsky with market manipulation under Section 9(a)(2) of the Exchange Act and we understand the government's manipulation charge essentially to be as follows: That Mr. Mashinsky told customers that Celsius would go into the market every week, and Celsius would only buy the amount of CEL token that was needed for weekly rewards. Nothing more, only that amount.

In reality, the government alleges that for somewhere between——I'm not sure——either a year and a half or four years, Celsius bought more CEL token than was needed for weekly rewards and that artificially inflated the price of CEL. Now, for purposes of today's argument, we'll set aside the fact that Mr. Mashinsky never actually said those words, that we will only buy the amount needed for weekly rewards. The Court can accept that as true for purposes of this motion, but it's certainly animating the motion that we've brought.

And the question presented is whether that charge, those allegations, Mr. Mashinsky received constitutionally sufficient notice that the charge conduct was criminal under Section 9(a)(2). And I'll note that we would hope that the

Court doesn't view this motion as some sort of a broadside against market manipulation as a crime in general. There's also a 10(b)(5) charge, and there's also a wire fraud charge that we have not moved against. This is a targeted motion focused on the statute that we believe is far too broadly worded and doesn't provide sufficient notice.

THE COURT: You can correct me if I'm wrong, but the gist of the motion is that this market manipulation charge can't apply -- cannot, does not apply to transactions on the open market.

MR. WESTFAL: That's right.

THE COURT: And there's no case that supports that proposition.

MR. WESTFAL: I think our motion, your Honor, is a little bit -- slightly different. It's certainly grounded in the open-market nature of the transactions. In some respects, perhaps in all respects, wash trading, match orders, those are open market as well.

What we're dealing with in this count, in this charge, is an allegation that genuine transactions between one counterparty and an unrelated counterparty. There's no collusion. There's no match trading at market prices, right. There's no allegation that the CEL token was bought at artificially inflated prices but it was bought at the market price. And the charge, as we understand it based on the

indictment and the government's opposition, is that it is criminal market manipulation for Celsius, and in this case Mr. Mashinsky, to have directed open-market transactions with genuine counterparties at the market price so long as those transactions moved the price, and it was done with criminal intent.

So the problem that we see with that charge, your Honor, or that theory is we have case law from -- starting with the Supreme Court in the *Crane Co.* case, which says that Section 9(a)(2) does not condemn extensive buying or buying which raises the price of a security in itself. So open-market transactions that move the price are lawful.

Several judges in this district, Judge Holwell, Judge Mukasey, and Judge Sullivan, have also come to the conclusions that securities transactions that move the price——that raise the price, that lower the price, are not in and of themselves criminal. And I'll focus --

THE COURT: But you can correct me if I'm wrong, but there is no case, where if those transactions on the open market are made with the requisite criminal intent, where a judge in this district has said that doesn't fall within the statute. I mean, I'll go back and read those cases again, but I thought that that was a given between parties, that there is no case of another judge of this court saying that if you do these things with the requisite criminal intent, that doesn't

fall within the statute. So the claim can be dismissed as a matter of law. The government points to at least one other case where they asserted the same theory, and your response was, well, that was after this case.

MR. WESTFAL: Yes.

THE COURT: And this motion has been pending for a little while. You can tell me what happened with that case, but the government has pursued that theory. And it's plain that simply because even if this were the first case to pursue such a theory, that's not in and of itself a reason for dismissal.

MR. WESTFAL: I think we agree with that last part, your Honor. I think as to the first part of the question, we also agree that in our research——and I think according to the briefing in the Hwang case and the briefing from this case from the government——that the Hwang indictment was the first time that the government had pursued this market manipulation theory in a criminal case under Section 9(a)(2).

So in terms of notice, my understanding is does the language of the statute provide notice to Mr. Mashinsky --

THE COURT: So the other cases which you had cited a few minutes ago don't stand for the proposition that a charge like this cannot be brought under the statute, right?

MR. WESTFAL: So my response, your Honor, is that the only case we're aware of that considered that issue -- the only

criminal case we're aware of that considered that issue is the Hwang case.

Our point in terms of fair notice/fair warning that this conduct charged in this way is criminal as opposed to a civil violation is that the only case that considered that issue was indicted after the conduct at issue.

THE COURT: I know. I was just drawing a distinction between the couple of cases, which you have cited from colleagues a moment ago, couldn't stand for the proposition that I thought you were citing them for which is that a charge such as this can't be brought under the statute. Those cases couldn't have stood for that.

MR. WESTFAL: And we're not citing them for that purpose. We're citing those cases to try to understand the scope of what we view as an impermissibly broadly worded statute. We're trying to understand it. And as we set forth in our papers, and I won't go through in detail now, to understand that statute, we start with the language. And the language itself says nothing about price manipulation. It says nothing about artificial prices, and it says nothing about manipulative intent, which the government is pointing to as the essential element that defines the difference between legal conduct and criminal conduct. It's not in the statute, and the only criminal case that has applied it in this manner was indicted after this case. That's our fair notice point.

THE COURT: What happened with Hwang?

MR. WESTFAL: So Mr. Hwang filed a similar motion to dismiss which Judge Hellerstein denied. The case went to trial, and I wish I were prepared today, your Honor. Unfortunately, I'm not. There was a fascinating moment that Ms. Young and I just happened to be in the courtroom for in which the government's cooperating witness was on the stand describing the conduct at issue, and Judge Hellerstein intervened started asking questions that I think everyone in the courtroom understood to be trying to elicit helpful testimony from the defendant.

I'll summarize from memory, and it's not perfectly accurate. The question was essentially: Well, isn't it possible that you were conducting securities transactions at an early morning time in order to raise the price to attract new buyers?

I mean, that almost to a tee describes the government's market manipulation theory here, and to a tee covers the elements of the statute. And again, I think everyone in the courtroom understood that to be eliciting testimony helpful for the defense which, again, I view as a problem with the statute.

I would also say -- and again, we can provide more information, and actually, your Honor, this will come up certainly in the context of the jury charge, certainly

depending on the outcome of this motion, but there will be inevitably, and there wasn't in the Hwang case, a fight about the, as I would describe, a single purpose test where there's ample case law in this district that says that if you enter in a securities transaction, in order for it to be criminal, you can only do it for the sole purpose of manipulation. And if you have a legitimate investment or economic reason to also enter into that transaction, it's by definition not criminal.

Now, the government doesn't agree with those cases and will cite different cases to you. When that was put before Judge Hellerstein, my read of the final instructions to the jury in that case was that there was no decision on that critical issue, and the Judge essentially said, Jury, that's for you to decide. Again, we view that as a problem that comes from a statute that's overbroad, and that does not define the difference between legal conduct and criminal conduct.

THE COURT: So Judge Hellerstein denied the motion to dismiss?

MR. WESTFAL: That's right.

THE COURT: And the case went to the jury, and there was what result?

MR. WESTFAL: There were, I think, convictions on all counts. I think there were nine, approximately nine, market manipulation counts. I think one for each of a different security. That case, as we understand it, there has not been

Rule 29 or Rule 33 briefing, and I don't know if it's going to be appealed. The defendant has not been sentenced yet, so it's in post-trial proceedings.

THE COURT: So the government can tell me. They are anxious to respond, and you'll have an opportunity shortly. Was Judge Hellerstein's denial of the motion to dismiss, you know, did that come down after the briefing on this motion? This motion was briefed a while ago, I know.

MR. WESTFAL: It did not. We've cited it in our papers, and the manner in which we cited it was to say the government in that case and Judge Hellerstein -- I might be wrong now that I'm saying it, but the point is Judge Hellerstein relied on the same three private civil securities lawsuits and SEC civil enforcement actions to approve of this market manipulation theory.

THE COURT: Okay.

MR. WESTFAL: The last thing I would say on this, your Honor, is I want to point out the language of the market manipulation theory based on those three cases. So the government has said this is perfectly legitimate. Mr. Mashinsky had notice. See the *ATSI Communications* case where the Second Circuit said in some cases scienter is the only factor that distinguishes legitimate trading from improper manipulation. And in the *Set Capital* case, open market transactions that are not inherently manipulative may

constitute manipulative activity——may——when accompanied by manipulative intent. So we have three cases that the government has cited in that case and in this case that they are using to ground their market manipulation theory, which is that the only line——this is quoting from the Second Circuit——between legitimate trading and improper manipulation, the only factor is scienter; someone's state of mind.

For that proposition, the reason that might be okay in a private case, a private securities case, or an SEC case is that those are civil. As Judge Holwell said in the *SEC v. Masri* case two things: One, it is unusual in American law to impose liability based solely on the intent of the actor, and it is hornbook criminal law that one is not punished solely for a criminal state of mind but only where one's action is prohibited as well.

What we view this market manipulation charge to be is: You purchased CEL token. It increased the price, and you did it with the wrong state of mind. The law says you can purchase CEL token to increase the price as long as you don't have the wrong state of mind. For that to be the only factor that differentiates between legal conduct and criminal conduct, we view as a violation of the hornbook law principle described by Judge Holwell.

I've just been given a note. If I could check one point, your Honor, on our brief on the Judge Hellerstein

question?

THE COURT: Relax. The government will have an opportunity to respond in just a moment.

MR. WESTFAL: I believe this is what I had said, but in our brief, we put in Judge Hellerstein's decision denying the motion in Hwang citing to the cases I just mentioned, *Set Capital* and *ATSI*.

THE COURT: Okay.

MR. WESTFAL: I think that's the theory of our motion, and, again, we view it as impermissible to rely strictly on civil SEC cases where the only distinguishing factor is what's in someone's head.

THE COURT: Okay.

MR. WESTFAL: Thank you, your Honor.

THE COURT: Thank you.

Government?

MR. DAVIS: Thank you, your Honor. I'd like to take these two motions in turn, so starting first with a brief response, if the Court would permit, on defendant's argument about the commodities count and the securities count in Count One.

So on that, Judge, I'd like to make three points. The first is about how the defendant has not identified any factual inconsistency here between the two counts. The second is how defense has not identified any legal inconsistency here between

the two counts or the application of the *Howey* test. And then finally, I want to get to the point that the defense raised about the sufficiency of the factual allegation about the sale.

So starting, your Honor, with the factual inconsistency. As this Court noted, there's no factual inconsistency between Count One, which alleges that there are lies in connection with the purchase of an interest in the Earn program, and Count Two, which alleges that there will lies in connection with the sale of Bitcoin to Celsius for an interest in the Earn program. As this Court notes, those are two separate transactions that we've identified.

And when counsel says that we've charged the same exact scheme twice, that's not right. The second part as alleged in the indictment, the sale of Bitcoin to Celsius, the first part, is talking about the investment contract as a whole. And that's what takes us out of these cases which talk about mutually inconsistent factual allegations; the allegations that cannot be true together.

That brings us to point two, which is legal inconsistency. And the way counsel has framed this argument is it says look at the *Howey* test. The *Howey* says you can't break down a transaction to its component parts, but the *Howey* they test does not say what can or cannot be a commodity. That is misusing the *Howey* test. And so, on this second point on whether Bitcoin is a commodity, we hear no dispute that Bitcoin

is a commodity.

On the first point that the interest in the Earn program constituted an investment program, we hear no dispute that that could constitute an investment program. Where we disagree is these courts that defense has cited about applying the *Howey* test, they do not say that they're being exclusive of what could be a commodity under the CEA. And to that point, your Honor, I think this Court recognized in *Reed* that a cryptocurrency could be itself both an investment contract and also fall under the jurisdiction of the CEA. And so, our view is consistent with all those cases that Count One and Count Two stand together.

Getting to this last point, as counsel says, counsel noted other times in the indictment different verbs being used. I would just cite to the Court that this was addressed in the *Coburn* case where *Coburn* says in an indictment using different verbs, the mere presence of different verbs in an indictment is not a problem. And what really counsel is saying is that there aren't sufficient factual allegations to support that this is a sale of Bitcoin, and that, as this Court has recognized, is a question for the jury. We have alleged it in the indictment. That's all that is required at this stage.

So with that, your Honor, I would like to move onto the market manipulation due process challenge that counsel has made. So for here, just to answer the Court's question

directly, this argument was rejected in *Hwang*, and the defendant was convicted in that case. Our understanding is that there was an oral application for Rule 29. That, too, was denied, and it was rejected for good reason. What the defendant is arguing here is a due process challenge based on vagueness, and we know how to answer that question. We look at the statute, and then we look at the decisional law to see whether a reasonable person would be on notice here.

And looking at the statute, the statute could not be more plain in penalizing people for -- it talks about actual and apparent trading in such security. That's talking about real trades. And then, the decisional law, as this Court recognized and as counsel conceded, the last decades of decisional law in this space have made clear that this theory of market manipulation is valid. That's *Valley Management* in 2022. That's *Set Capital* 2021. That's *Royer* in 2008. That's *ATSI* in 2007, and that's *Gilbert* and *Stein*.

Counsel relies on this citation to crane it for this proposition that 9(a)(2) cannot be read. It's not meant to penalize extensive buying or buying which raises the price of the security in itself. But just go one paragraph above that in the opinion, and what does it say? That 9(a)(2) was considered to be the very heart of the act, and its purpose was to outlaw every device used to persuade the public that activity into this security is a reflection of a genuine demand

instead of a mirage. That's exactly what we've charged here. We've charged Mr. Mashinsky with making the mirage. But your Honor, obviously, doesn't even need to reach this because at this stage, this is an as-applied challenge. And we would say it's premature, and it would be denied on that basis alone. Indeed that's what Judge Liman did in *Phillips*. That's what Judge Subramanian did in *Eisenberg*.

And here, this is a good case to do it as well because the factual record at trial would also defeat this. This would be a very perverse case to be saying that Mr. Mashinsky was not on fair notice. We have additional manipulative conduct that was alleged in the indictment, including lies, including allegations about the timing of trades to maximum pricing, but also -- so I'd say that's why the as-applied standard exists because the full factual record is not before the Court.

Unless the Court has other questions on either of those motions, your Honor, the government rests on its submission.

THE COURT: No, but by the way, the motions *in limine* are not fully briefed. Is the issue of the bankruptcy at issue on motions *in limine*?

MR. DAVIS: It is, your Honor. We anticipate -- so I think we both have moved *in limine* on this issue, and so, our response to the defendant's motion is due tomorrow so that is a live issue on the motions *in limine*.

MR. MUKASEY: I think that's right. I think what I would have said if we argued the surplusage motion, and I understand I probably have the better chance under the motions *in limine* than I do under a surplusage standard to keep this out.

THE COURT: Yes.

MR. MUKASEY: What I would have said is the surplusage is simply a teaser and the main event is coming in the motions *in limine*. So if you want to punt until then, that's absolutely fine.

THE COURT: I am sure I will deny without prejudice the motion to strike as surplusage because motions to strike as surplusage are not favored in the district, and it's really better made as a motion *in limine* or a motion at trial.

MR. MUKASEY: Say no more. We are going to brief this extensively, and you'll get it tomorrow in the motions *in limine*. Thanks, your Honor.

THE COURT: Okay. Thank you. So subpoenas or depositions or Rule 15. Defense motion.

MR. WESTFAL: Your Honor, I will be arguing this motion as well.

Your Honor, we have moved to preserve the testimony of five material witnesses by taking the deposition of four and serving a subpoena for the appearance of a fifth. Based on the government's opposition in our reply brief, just to make clear,

we're no longer seeking the deposition of Mr. Cohen-Pavon in light of the commitment that he will be appearing at trial. So the witnesses who are left are Daniel Leon, who is a United States citizen living in Israel. We would move to serve a subpoena requiring his personal appearance at trial, and we're seeking the depositions of Johannes Treutler, who is based in Germany; Ron Sabo, an Israeli citizen whose last known residence is the Netherlands; Yaron Shalem, based in Israel, and Yarden Noy, and attorney also based in Israel.

Both sides, I think, largely agree on what courts have considered discretionary factors; factors that will guide the Court's analysis and discretion. The first being whether the witness is unavailable to testify at trial. The second being whether the testimony is material, and third whether it's necessary to take the deposition in order to prevent a failure of justice.

The government in its opposition --

THE COURT: Could I stop you at the outset?

MR. WESTFAL: Of course, you can.

THE COURT: Among the government's main arguments is it takes a lot of time to get testimony no matter how the testimony is sought, whether it's letters rogatory or even if MLAT was used. And the motion is essentially a stalking horse for a motion to adjourn the trial.

Are you seeking to adjourn the trial?

MR. WESTFAL: We are not seeking to adjourn at this time, your Honor.

THE COURT: I read that qualification in the brief, too. In a way, that weakens your motion, for what it's worth, because it tends to support the government's proposition that the defense knows that it can't get the testimony between now and the beginning of the trial in January. The trial has been scheduled for January for over a year, and it was set for a long time. It was an unusually long setting for a variety of reasons, and the defendants could have and should have known about these potential witnesses based upon the indictment, based upon the defendant's knowledge of who these people are, where they are in the hierarchy of the company, where they would have fit in this terms of any arguments of fraud or misrepresentation or market manipulation.

So the government essentially says that -- not essentially. I mean, they say that the motion is simply a device to try to put off the trial and to get further discovery, to get 3500 material before it was otherwise due. Now, your position is somewhat less than clear by saying we're not seeking to adjourn the trial date at this time.

I would have thought that, to be perfectly clear, based upon all of the papers, the defendant has a good case to get testimony from abroad but not if it's simply being used to adjourn the trial, and that the testimony is not so critical,

particularly given the testimony of Cohen-Pavon, that in some way the testimony is so necessary that it has to be granted or that it's a basis to adjourn the trial.

So I would have thought that the defense position would be strengthened by a simple statement that based upon attempting to get the testimony of these witnesses, given when we're asking for it, we're not asking to adjourn the trial date. We'll do everything we can to get these witnesses' testimony.

If we don't get these witnesses' testimony, we know we have Cohen-Pavon and perhaps the witness that we're going to, if you let us, Judge, subpoena, because it's a U.S. national, and we want the testimony of the other witnesses at trial. But we are not seeking an adjournment of the trial date, and we wouldn't seek an adjournment of the trial date simply because these other four witnesses, we've been unable to get. We know the difficulty of trying to get these witnesses, and we know we could have tried to get these witnesses months and months ago, indeed probably a year ago.

So we know the landscape, Judge, but we really want the testimony of these witnesses because we think that their testimony would be material. But we're not using this as a stalking horse to ask for an adjournment of the trial period. Not we're not asking for an adjournment at this time. So, your turn.

MR. MUKASEY: You can feel free to blame this on me.

MR. WESTFAL: I won't. I'll take absolute full responsibility for our position, which I'll try to lay out. I think the first thing we would say is we categorically reject the accusation that this is some underhanded way to seek an adjournment somewhere down the line. It's never been part of our --

THE COURT: There's a way to answer that. By not simply saying that it's not part of our strategy; by just saying we're not going to do it.

MR. WESTFAL: So the reason I haven't that, your Honor, is I don't think we can. And there's a lot to sort of unpack in your question, and so I'm going to try my best to sort of walk through sort of how we got here.

I think the first --

THE COURT: It's really not a complex question. Go ahead.

MR. WESTFAL: I'm intending to respond to sort of the totality of the question. And the first point, your Honor, is we anticipated and this process has confirmed that the government's view of materiality of foreign witnesses is at such a high bar that it may be impossible to reach. In order to try to reach that nearly impossible bar, we had to and are still in the process of sifting through millions of pages of documents, WhatsApp messages in Hebrew. And the idea that we

could have said, your Honor, this is the COO of Celsius. He is a material witness. Just trust us. We tried to support our motion and we have.

THE COURT: Yes, you submitted a lot in support of your motion. The indictment was very detailed. The position of these people within the corporation was known to the defendant. The defense was something that——I gleaned from the papers——would have been known to the defendant. Plus, the critical witness, for purposes of the defense which just, you know, comes out from the paper, is Cohen-Pavon. And that, of course, was known to the defendant and was really not an issue on the current motion in view of the fact that he is no longer unavailable.

So what we're talking about are the remaining four witnesses. The fifth is subject to subpoena. Whether that witness will show up in response to a subpoena is another question. But it's really hard to see why the motion would not have been made earlier on the grounds that you think the government was being too severe on its view of materiality.

MR. WESTFAL: I don't think it's -- I think there's a couple points that we'd like to get across, your Honor. I think the thrust of the market manipulation charges and the evidence that we put forth to support our motion is that the charge says these hundreds of thousands of CEL token transactions are all his fault.

What we've tried to show, your Honor, is that over the course of years, the responsible individuals who made those decisions were not Alex Mashinsky. It was Johannes Treutler, based in Germany; Ron Sabo; Yaron Shalem; the individuals who we seek their testimony.

We couldn't know. The whole point of the defense is that Mr. Mashinsky, until we got the discovery, we could not know that Roni Cohen-Pavon had told Johannes Treutler in a WhatsApp message, Johannes, get the price to eight. We couldn't know that until we find it.

THE COURT: Of course.

MR. WESTFAL: And we have to put all of that together, and it takes a lot of time, a lot of time.

THE COURT: Of course, you'll have Cohen-Pavon.

MR. WESTFAL: And we also, your Honor, disagree, respectfully, with the notion that having a cooperating witness, whose testimony will determine the outcome of his sentencing in months or years down the line, that that is sufficient for a defendant who has far more on the line and has other material witnesses who know.

THE COURT: You're mixing two things. First, is Cohen-Pavon an important witness for you?

MR. WESTFAL: Yes.

THE COURT: Is he subject to you impeachment/cross-examination with if you try to get the

testimony of the other four, and don't get the testimony of the other four in the somewhat more than two months between now and the date of trial, you will be back in January, as the government suspects, asking for an adjournment because you weren't able to get the testimony of these other witnesses that you asked for but didn't seek their testimony for over a year, which is what essentially the government is arguing. Do you follow my distinction?

MR. WESTFAL: I think so, and I think our response and I apologize if this is coming off as nonresponsive. It's not intended to be. It is just that these are complicated factors in the way I think about things.

THE COURT: It's not so complicated for me really.

MR. WESTFAL: Right. I think our point is the notion that if we had sought the testimony of these witnesses in September or whatever it is, and I guess I'll point out that we received, I think, another 700,000 pages of discovery just a few months ago. So it's not as if we got all the discovery we needed, which is how it was presented to your Honor by the government in July, and we've had it for a year. We received more discovery last week.

So the idea that we could have come and said, your Honor, this is Ron Sabo. He was the head of research. He was involved in CEL token. We don't know what he was doing or what his conversations were with Mr. Cohen-Pavon, but we think he's

important so we think that meets the materiality test. I think that would have been rejected out of hand. Instead we tried and are still trying to understand what the voluminous discovery shows and to try to show your Honor what happened here.

We think it's pretty clear what happened here. We don't feel that it is enough that we have a cooperating witness that we can cross-examine when there are four/five material witnesses, who happen to live outside the United States, who know exactly what happened.

THE COURT: And whose testimony you may never, ever get.

MR. WESTFAL: And all we're asking for, your Honor -- there's one more sort of piece of this that I want to loop in. All we're asking for and prioritizing and not trying to jump to an adjournment is the permission that we need.

THE COURT: I know what you're asking for.

MR. WESTFAL: And the adjournment evaluation, I think this is the last piece that has mattered a lot to us and will matter a lot to us in two months. We expect that all of the exhibits or most of the exhibits we've given to you will be objected to as hearsay. So it's not just that we don't have the witnesses' testimony. We don't have these documents that we think show clear as day that the people responsible for what happened with CEL token are them and he literally had nothing

to do with it. It was not reported to him and in fact was concealed from him for six months. No one ever said, Yes, Mr. Cohen-Pavon could tell me to boost the price of CEL token secretly in this secret FTX subaccount that no one knew existed, and we expect that the government is going to say, That's all hearsay.

On top of that, your Honor we also expect that aside from Mr. Cohen-Pavon, the government, as we've experienced in our recent trials in this district, will call as few percipient witnesses as they can. And they have a motion pending, which is we want to get in every WhatsApp email from any Celsius employee who has ever existed under agency theory. So the government will be getting in as many documents and as few witnesses as possible. We'll get in zero documents, zero witnesses who we view quite clearly as knowing exactly what happened here, but we get to cross-examine Roni Cohen-Pavon.

We don't feel that that meets the test, and in fact, if that's the situation in two months, we're not sure that that satisfies due process; for us to not be able to get in documentary evidence as hearsay and to not be able to call witnesses to establish our client's defense. That's our concern.

THE COURT: Go ahead.

MR. WESTFAL: So I think what I'd like to do, and I'd like to do it in as streamlined a fashion as I can, believe it

or not, is I'd like to go through each of the proposed deponents and show you really the highlights. And I can do it in as short a form as possible and show you whatever your Honor's preference is.

THE COURT: I've read the papers, right.

MR. WESTFAL: Understood.

THE COURT: That strikes me as simply reiterating your brief to me.

MR. WESTFAL: No, don't need to do that.

THE COURT: I get your point that these are, from your standpoint, significant witnesses. Whether they're cumulative to what Cohen-Pavon would ultimately be testifying to, you know, doesn't mean that they're not significant witnesses or that if the other requirements of the rule are met, that's a sufficient reason not to give you the opportunity to attempt to get their testimony if you could.

So go ahead.

MR. WESTFAL: So I won't then kind of walk through each of the witnesses recognizing your Honor's familiarity. I think the last point——and I just want to flip ahead in my notes——is to say the following.

THE COURT: The government says you have no realistic prospect of getting the testimony of these people in the time before trial, somewhat more than two months before trial, and your response to that is what?

MR. WESTFAL: I think Judge Cronan in the *Alexandre* case said, It's speculation. Let us try. You deserve the opportunity to try. I think that's all we've asked for is let us try. The idea that it is kind of beyond the realm of possibility that these individuals would respond to government officials in their countries pursuant to the MLATs that we've provided to your Honor. I think the MLATs provide a real opportunity to exercise the process. The problem is we have no ability to utilize the MLATs, and I think may read of the case law is that judges aren't going to order the government --

THE COURT: I believe the First Circuit has said that a judge lacks the power to order the government to use the MLAT because the MLAT is designed to be used by the government. It doesn't mean that the government couldn't do it but that the Court has no power to order the government to do that.

MR. WESTFAL: I think that's our read and we agree with that, but the MLAT process is available in each of these three countries. And again, our priority at this moment is simply getting the Court's permission to try, and if the government chooses not to utilize the tools at its disposal——again, I think it was Judge Cronan who said that——I don't think the government needs to be heard then to complain about delays, et cetera. There's certainly no prejudice that the government has spoken to, and Judge Sullivan talked about in the *Epskamp* case. He said, yes, a delay, it happens. But

unless the government has presented your Honor with the manner in which they'd by prejudiced, which they have not, I don't think there's more that needs to be said other than the government thinks there's a low chance of us getting it, and they can choose or not to choose to help us with the process of obtaining the testimony of these four witnesses. Without more, it's hard to justify denying Mr. Mashinsky this relief because the government doesn't offer any relief if it's granted.

MR. MUKASEY: Judge, may I have one moment, please?

THE COURT: Sure.

(Counsel conferred)

MR. WESTFAL: Thank you, your Honor.

Just trying to think through the process that if your Honor were to grant the motion and we either, with the government's assistance, went through the MLAT process or the letters rogatory process, and in a couple times month there's been zero traction; we've heard nothing; there's no prospect, then we wouldn't seek an adjournment because there's no prospect, and we're a couple weeks before trial. If we were able to go through the process and there's engagement from Germany, Israel, the Netherlands and things are being scheduled, we certainly do reserve or would like to reserve the ability to seek an adjournment. Because, in our view, the possibility of a delay is so clearly outweighed by our client's interest in putting on a defense in a fair trial and the

consequences that the government has made clear he may be facing here.

THE COURT: Well, we're making progress. We've gotten to the point where if I granted the motion and we're in January, shortly before trial, and there's no discernible prospect that the additional witnesses are about to be able to be deposed, you wouldn't be seeking an adjournment on that basis. That's progress.

MR. WESTFAL: I think it's hard -- you know, I'm not great at predicting and knowing exactly what the next move is. That's sort of where I'm coming from.

THE COURT: It would be so simple, really, to simply say that we're not using the motion as a basis for delay. We think it's important to grant the motion. If we're not able to get these people by now, taking everything into account, including when this motion was made, what the basis for the motion is, we're not going to use this as a means to adjourn the trial, which has been scheduled for a long time and which would require a great deal of pretrial preparation on behalf of both the government and the defense. We're not going to be back to you in January saying you know, the government predicted we could never get these depositions in the somewhat more than the two months that we've asked for them, and the government was right. So we're not going to use the motion, and, Judge, your gracious grant of the motion, as a basis to

adjourn the trial. We're not going to do that. We're not going to give credence to the government's argument that we just made this motion knowing that we couldn't get these people in the somewhat more than two months. We're not going to do that. You've made some progress but not all the way.

MR. WESTFAL: I think, your Honor, you've stated our view. I do want to go back to something I said, now I think a few minutes ago, which is we do categorically reject the allegation that this is being used to adjourn the trial. That's not why we're doing this, and we hope that our papers have shown that to you, that there is quite clearly a substantive reason that these are material witnesses.

We fully recognize, your Honor, the issues of timing and the issues of delay. We're not blind to those, but our priority at this moment is to get permission from your Honor. And I guess the last point I make on the MLAT process is: The government states that the MLAT process can't be used for "defense depositions." We disagree with that. The MLATs that are before the Court make no mention of defense depositions or government depositions.

In the *Coburn* case in New Jersey, that I believe Mr. Davis mentioned a few minutes ago, the government made the same representation. We can't use the MLAT to seek defense depositions, and then a few months later, that's exactly what they did. They used the MLAT process. So we do take issue

with the idea that the MLATs can't be used, but we're just, as I stated previously, are not in a position to force the government to join us.

THE COURT: Okay. Anything else?

MR. WESTFAL: I'll check my notes, your Honor.

THE COURT: Do you want to respond at all to the government's argument that it's an essential part of the defense application to show that the witnesses would be available for their deposition, that they would show up?

MR. WESTFAL: We do. That was actually the first point I had in my planned remarks, your Honor. We certainly disagree, and we disagree on sort of a number of bases. I think the simplest basis is the language of Rule 15, and that's what Judge Sullivan pointed in the *Vilar* case. The drafters, the advisory committee, made very clear in Rule 15 that deponents have to consent to depositions if they are a defendant. When the committee drafted in that way, we don't see it as a correct interpretation of the rule for the government to say actually it's not just defendants, it's every deponent that they have to consent there's a voluntary appearance requirement. That's just simply just not what the rule says.

THE COURT: What do you do with the Second Circuit's comment in *Whiting*?

MR. WESTFAL: So certainly a tricky one. *Whiting* was

decided, I think, 62 years. For the next 62 years, we haven't found a court that has made mention of that being a requirement under the rule until Judge Furman just a couple months ago. And that includes several Second Circuit cases that we've cited, including the *Cohen* case from 2001, the *John Polk* case, and the *Celine* case. And we would note that not only does the rule not say what *Whiting* and Judge Furman has said, but no case in the 62 years in between has said it either.

If your Honor were to agree with Judge Furman, we're sort of stuck there, right. I mean, there's nothing we can certainly do about it. We just disagree with the language of -- based on the language of the rule and the overwhelming body of case law in between. And we cited to your Honor, I think, the *Alexandre* case and the *Grossman* case, which are analogous situations where the defendant was, in the Grossman case, dealing with a deponent in Canada, who counsel was speaking with for months, and suddenly dropped off the face of the earth.

Judge Stein made no mention of a voluntary appearance requirement and granted the Rule 15 application, and Judge Cronan did the same thing in *Alexandre* with crypto companies based in Estonia and Cyprus, I believe. So that's our position on *Whiting*.

THE COURT: Okay. Thank you.

MR. WESTFAL: Thank you, your Honor.

THE COURT: Government?

MR. HOBSON: Your Honor, I'll be brief, but I did want to respond to some of these points.

First, on the MLAT point, we've discussed this with the Office of International Affairs at the Department of Justice. They have informed us that for Germany and Netherlands, the MLAT would not be available here because those countries or our obligations with those countries require that it be in furtherance of a government case, and they view these requests here as not in furtherance of the government's case. So we've been told that it would not be available to us there.

We've been told it would be available to us in Israel, but that it would take months and months to succeed in getting an answer on the MLAT. We're told in Israel the fastest they've seen an MLAT answered is two months, but they emphasized to us that that is the fastest and it's generally in very urgent and pressing situations. They've also emphasized to us that political affairs can sometimes complicate it. In other words, how busy the Israeli government is with other things can complicate how long it takes them to act on MLAT, and OIA felt that the particular geopolitical situation at this time would qualify as a busy time for the Israeli government. That's why we don't think there's any foreseeable chance of getting this done in the near future.

I also want to emphasize that even engaging the

machinery is a tremendous amount of work and expense both for our team, for OIA, and for the foreign courts that would have to be involved. On the other side of the ledger here --

THE COURT: That argument is not, frankly, terribly persuasive to me.

MR. HOBSON: I understand, your Honor.

THE COURT: The government does not have unlimited resources but the government has sufficient resources to have an attorney work on attempting to get testimony from four witnesses.

MR. HOBSON: The point is, I think the daily work on that might be more than the Court might appreciate. I understand it is not the driving concern. It is a concern that the case law says is relevant, so I'm raising it. I think there are bigger concerns here.

THE COURT: And with respect to whether the witnesses are part of the government's case, witnesses are being sought by the defense and the defense wants their testimony. But I assume from the government's papers, the government says these people might not want to testify because they were participants in a conspiracy, which would make them part of the government case.

MR. HOBSON: I understand, your Honor. I can tell you I raised those arguments to OIA, and I was told that they would not work for the Germany and Netherlands MLATs. I have to rely

on them there. I'm only saying what I was told.

THE COURT: Why would that be true though?

MR. HOBSON: Because it's in furtherance of the defense case, in this case, the depositions themselves.

THE COURT: I know that. I know that, but it would seem to me the government has to be completely honest with the process. But based upon the allegations in the government's papers, these people, if they were prepared to testify, the government says they would be government witnesses. And if that's true, they could then be sought under MLAT, right?

MR. HOBSON: I don't think we said they would be government witnesses.

THE COURT: Because the government says they were participants in a conspiracy and might be asserting their Fifth Amendment privilege, which means that they would be——putting aside the Fifth Amendment privilege——according to the government, material witnesses for the government, not the defense. They would be supporting a government theory of a criminal conspiracy.

MR. HOBSON: And potentially subjects of the larger investigation as well. I believe the OIA's point was that in our duty of candor to the foreign countries here, we would have to note that this was a result of the requests that these witnesses be called for the defense case, and that because of having to disclose that fact, it would not be granted.

I am limited in my knowledge there. But we also understand that regardless, it would be a process of several months that they've had -- each of those countries has had one recent experience with the MLAT for the government testimony for a government witness, and it took many months and was very difficult to arrange and could not foreseeably be done on this timeframe.

The *Whiting* point on this threshold inquiry of whether a witness is willing to testify sort of goes hand in hand with this because it's sort of asking: What is all this worth in the end, and if the expectation is that no one is going to testify or is going to assert the Fifth Amendment, then what is it all really worth? As far as we know, *Whiting* is still good law. It's still being cited by the Second Circuit ever since it came down. It was cited recently by Judge Furman and *Ramirez*, as the Court noted.

I think the reason that you don't see the specific instance of a party deponent or a party witness declining to be deposed is that the normal situation, a party is proposing the foreign deposition of the witness who it has been working with, who is a party witness, who has met with the proponent of the testimony, who often has sworn out an affidavit about what they would say, has at least made specific representations to the defense attorney or the government attorney, depending on what the party is, about what that witness would say so that the

attorneys can make specific representations.

We don't have that here. I think that's what makes this a very difficult case to evaluate on materiality. Because we have speculation about what -- about topics that these witnesses would know about, but we have no indication from defense counsel about what they think they are going to say because the only thing these witnesses said they would say is nothing.

THE COURT: Well, the defense relies upon the documentary evidence about what these witnesses allegedly did at the time. Before we get into that, before we leave *Whiting*, you said quickly that it's been followed by the Second Circuit.

MR. HOBSON: I said the Second Circuit has continued to cite *Whiting* in general, not for the specific proposition but for its overall holdings about Rule 15 and the standard.

THE COURT: What cases has the court of appeals cited *Whiting* in?

MR. HOBSON: Let me look in my notes and see if I have it here. I can certainly get it for the Court. When you read Second Circuit decisions on Rule 15, *Whiting* is often among the cases it has cited.

THE COURT: Okay. On the issue that there must be an indication of the witness's willingness to testify, with respect to that comment in *Whiting*, wasn't that dicta?

MR. HOBSON: No. I don't believe so, your Honor.

THE COURT: The holding in *Whiting* didn't depend upon the fact that there was no indication that the witness had indicated a willingness to testify. Ultimately what the court of appeals said was: It was not an abuse of discretion for the district court to have denied the Rule 15 request because in the first instance, the request was denied by the district court because it was vague and speculative. And in the second instance, it was denied because it was too close to trial, and therefore, in neither case was it abuse of discretion. So the court of appeals did not hold that it was proper to deny the request because the requester had not shown that the witness was willing to testify.

MR. HOBSON: Your Honor, I don't believe they -- I don't believe the witness there had been -- I don't believe the deponent had shown that the witness was willing to testify in that case.

THE COURT: But the court of appeals didn't base its holding on the fact that there was no evidence that the witness had agreed to testify. The court of appeals said here are the requirements for Rule 15, and then said that what was represented was vague and speculative in the first instance, and second, too close to trial in the second instance.

MR. HOBSON: Your Honor, I think that's slicing it pretty thin when the court in *Whiting* was pretty clear that one of the things you had to show was that the witness was willing

to testify. That's something that not only did Judge Furman reaffirm that recently, but Judge Kaplan in the *Chusid* decision relied on the fact that the witnesses there weren't willing to testify.

THE COURT: Judge Furman denied the request also on the grounds that it was made on the eve of trial.

MR. HOBSON: Your Honor --

THE COURT: And plainly, what was said in *Whiting* has been not followed by other judges in this district.

MR. HOBSON: Your Honor, the only example I'm aware of is the Judge Sullivan opinion; is that correct? And I don't believe Judge Sullivan addressed *Whiting* there, and he said there was no case law on point.

THE COURT: So he just missed it?

MR. HOBSON: Your Honor, I don't know. But the opinion did not address *Whiting* when dealing with that issue, and Judge Furman noted that in his decision. I think regardless of whether we treat this as a threshold issue or an important issue to be considered, the case law is clear that you are supposed to consider things like whether this is likely to lead to admissible testimony. And if a witness has said that they will not testify, then that by definition is not likely to lead to admissible testimony and does make it worth going to all this effort and expense to go down this road.

THE COURT: Go ahead.

MR. HOBSON: I do want to push back on the idea that they have met the materiality standard here. I think they're very much treating it as a relevance standard, and that is not the law in this circuit. They said the government is pressing a high standard. The standard we're pressing is the one that the Second Circuit has enunciated, which is some showing behind unsubstantiated speculation that the evidence exculpates the defendant; that it has to be highly relevant to a case. That's the *Vilar* case.

THE COURT: I'm sorry, *Vilar*?

MR. HOBSON: *Vilar*, the Judge Sullivan decision.

THE COURT: I was going to say it's not the Second Circuit. It's the district court.

MR. HOBSON: I know, your Honor. The *Kelley* case is the Second Circuit case that we had cited. I'm citing other cases now, the *Vilar* decision, which said it was highly relevant to a central issue in a case. That's quoting the *Grossman* decision.

THE COURT: And Judge Sullivan granted it.

MR. HOBSON: For two witnesses, and he denied it for two. And he denied it for two because there were not particular enough allegations about what the witnesses would say and why it would be, in that case, inculpatory, I believe, because they were government witnesses.

THE COURT: Go ahead.

MR. HOBSON: Judge Kaplan has said it has to be more than merely relevant. I think that's an important standard here. We don't deny that these witnesses, who were at the company, who were involved in some of the relevant transactions would meet the standard for a deposition in civil discovery, but here you have to show what they would say and why what they would say would be exculpatory. Here, there's no reason to think they would say, We didn't tell Mashinsky about our illegal actions. It is, we would submit, more likely they would say, We did tell Mashinsky.

THE COURT: I thought that the standard was somewhat less than exculpatory, that it was something like materiality.

MR. HOBSON: I think Judge Kaplan sort of grappled with this *Abu Ghayth* decision where he says, It need not be definitive proof of guilt or innocence, but the testimony should be more than merely relevant. And then, the *Pham* case says that the testimony should challenge central aspects of the government's allegations. So it doesn't have to be proof of innocence, but we have to know what these witnesses are going to say that would actually tend to disprove the government's case.

THE COURT: The defendant has made some particularized allegations based on the documents that the witnesses would testify in ways that are directly inconsistent with some of the allegations in the indictment about what the defendant was

allegedly telling the other people in the company to do as to whether to purchase or sell CEL. And the response by the government is, yes, those may appear to be inconsistent, but they are not really inconsistent because the instructions were being given at different times as to whether to purchase or sell. But the allegations from the documents are at least significant in terms of challenging some basic allegations in the indictment. And the defense has made particularized allegations, and the government has only briefly responded to them in saying there's nothing inconsistent because this was going on at different times in 2020 and 2021.

MR. HOBSON: Your Honor, our argument——and our allegations in the indictment——is that this was an ongoing price manipulation scheme by Mashinsky and that sometimes he was dialing the buying up when he needed to go high, and when it got too high, would he dial it down. And so, it is a continuous process of manipulating the price. The fact that sometimes he said buy and sometimes he said sell is not inconsistent with that. What's missing from the defendant's arguments here are any indication that these witnesses are going to say I wasn't discussing this with Mashinsky. And our understanding from meeting with Cohen-Pavon, meeting with other witnesses, is the witnesses were going to say they were being instructed by Mashinsky to do and that they did know about it. It's their burden to show that these witnesses would say

otherwise. They haven't met that burden here.

THE COURT: All right. Go ahead.

MR. HOBSON: Your Honor, with that I'll rest on our papers unless the Court has more specific questions for me.

THE COURT: No, I think that's it.

MR. WESTFAL: Your Honor, could I respond just to that last point?

THE COURT: Sure.

MR. WESTFAL: Thank you. I think we noted in our papers and I'm not going to go through every witness, but I'll go through one on this last point that Mr. Hobson made. The government in their papers said, We've interviewed both Cohen-Pavon and Treutler and can confirm that each witness has stated in substance and in part that they were instructed by Mashinsky to purchase excess CEL tokens to support the price of CEL. It's a representation from the government with no evidentiary proof.

In our reply, we provided, in the papers as well as on video, the following, and I'll summarize from Mr. Treutler: "Q. (By the FBI): Did Mr. Mashinsky ever instruct you to support the price and make the market look strong by eliminating sellers from the order book?

"A. No.

"Q. Did Alex ever ask you or direct you to make the market look stronger by doing purchases in the market?

"A. I mean, he didn't ask me to do any purchases.

"Q. How did Alex want to enable using CEL token as collateral? Was it by making the market for CEL token to be stronger?

"A. No. He wanted a lot of use cases for the token."

You have that evidence before you. It is -- I don't know under what standard that couldn't be material.

THE COURT: All right. Okay. I've listened to the parties, and I'll have a more extensive decision with respect to the issue of the depositions and the issue of the motions to dismiss, but I don't want to be responsible for any delay. So briefly, with respect to the application for preserving testimony under Federal Rule of Criminal Procedure 15, a Court may order the deposition of a witness to preserve testimony for trial where there are exceptional circumstances and in the interest of justice.

To establish exceptional circumstances under Rule 15, the movant must show:

"(1) the prospect witness is unavailable for trial;

(2) the witness's testimony is material; and

(3) the testimony is necessary to prevent a failure of justice." *United States v. Cohen*, 260 F.3d 68, 78, Second Circuit 2001.

After considering all of the papers and the argument of the parties, the defendant's motion to preserve the testimony of material witnesses residing outside the United

States is denied as moot as to Cohen-Pavon and granted as to Treutler, Sabo, Shalem and Noy. Further, the defendant's request pursuant to 18 U.S.C. Section 1783 to serve a subpoena requiring Leon to appear at trial is granted.

The Court orders that the depositions be recorded by video, to the extent that they are taken by deposition, to allow for presentation to the jury in a manner that would replace in-trial testimony. The parties are directed to confer and work in good faith to identify appropriate next steps including to arrange for the depositions to occur as soon as possible. See *United States v. Fargesen*, 21-Cr.-602, 2022 WL 4110303 at 5, Southern District of New York, September 8, 2022.

While not directing the government to take any specific actions, the Court asks the government to consider using MLATs, or other processes, for seeking international assistance that might expedite the necessary coordination with Dutch, German, and Israeli officials. See *United States v. McLellan*, 959 F.3d 442, 476, First Circuit 2020. As the Court indicated at argument, while the Court finds that the defense has made a sufficient showing to try to get the testimony of these witnesses, the defense has not shown any basis for the adjournment of the trial if that testimony is not obtained, and the defense has said that it is not seeking an adjournment of the trial at this time. The clerk is respectfully directed to close ECF No. 68. A more extensive opinion will follow

shortly.

As to the motion to dismiss Counts Two and Six, again, a more complete will follow soon. But the defendant's motion to dismiss Counts Two and Six of the indictment is denied, and the defendant's motion to strike surplusage is denied without prejudice. So ordered.

I should have the opinions out for you quite early next week. Anything else?

MR. DAVIS: No, your Honor. Thank you.

MR. MUKASEY: No, Judge. Thank you.

(Adjourned)

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